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Supreme Court of The United States

OCTOBER TERM, 1968

No. 532

DARLINGTON-HARTSVILLE COCA-COLA BOTTLING COMPANY, INC., *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

SPARTANBURG COCA-COLA BOTTLING CO., *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of The United States

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DARLINGTON-HARTSVILLE COCA-COLA BOTTLING COMPANY, INC., *Petitioner*

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit entered in the above cases on March 26, 1968.

OPINIONS BELOW

The opinion of the District Court for the District of South Carolina is unreported. The opinion of the Court of Appeals for the Fourth Circuit is reported at 393 F2d 494. Copies of both opinions are printed in the Appendix, *infra*, pps. 16-22.

JURISDICTION

The judgment of the Court of Appeals was entered March 26, 1968, and the petition for rehearing was denied June 21, 1968 (Appendix, *infra*, p. 19). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

(1) Must an expenditure be capitalized *per se* where it secures for the taxpayer a business advantage or benefit extending beyond the taxable year?

(2) Were the 1964 payments by Petitioners securing business advantages or benefits extending beyond the taxable year of payment deductible as ordinary and necessary business expenses?

STATUTES AND REGULATIONS INVOLVED

The statutory provision involved is Sec. 162(a) of the Internal Revenue Code of 1954 (26 U.S.C. 162(a)), the applicable portion of which reads as follows:

> (a) In General. — There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. • • •

The income tax regulation involved is Sec. 1. 162-1(a) (26 C.F.R. Sec. 1. 162-1(a)), the applicable portion of which reads as follows:

> Sec. 1. 162-1 Business expenses — (a) *In general.* Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business • • • . • • • The full amount of the allowable deduction for ordinary and necessary expenses in carrying on a business is nevertheless deductible, even though such expenses exceed the gross income derived during the taxable year from such business. • • •

STATEMENT

These suits were consolidated in both the District Court and the Court of Appeals. The facts were stipulated and, in summary, are as follows:

Petitioners (Darlington-Hartsville Coca-Cola Bottling Company, Inc., hereinafter called Darlington; and Spartanburg Coca-Cola Bottling Co., hereinafter called Spartanburg) are South Carolina corporations engaged in bottling and selling Coca-Cola in separate and exclusive territories in South Carolina. They conducted their businesses pursuant to contracts with H. D. & J. K. Crosswell, Inc., a South Carolina corporation hereinafter called Crosswell. This arrangement for bottling and selling Coca-Cola in the specified territories was approved and authorized by The Coca-Cola Company, a Delaware corporation, hereinafter called Company. All rights to bottle and sell Coca-Cola initially emanated from Company or its subsidiaries and Company produced all syrup used in manufacturing the product.

Crosswell did almost nothing in the bottling and selling of Coca-Cola. Nevertheless, because of its contract with Company, Crosswell realized certain specified gross profits on every gallon of Coca-Cola syrup purchased by Petitioners. Crosswell did this by requiring Spartanburg to pay to it 10c more per gallon for syrup than it had to pay Company and Darlington, 15c more per gallon.

With increased competition and higher costs following World War II, Petitioners and Company developed a plan to be rid of Crosswell and thereby to reduce the base price of syrup by eliminating the amounts Crosswell was receiving on all syrup purchased by Petitioners (Par. (10) of the Stipulation of Facts, Appendix, *infra*, at p. 21).

Pursuant to the agreed upon plan, Company purchased all of the issued and outstanding stock of Crosswell on January 2, 1964, and liquidated Crosswell on January 5, 1964. Three days later, on January 8, 1964, Petitioners reimbursed Company their pro-rata shares of the cost of the Crosswell stock. Simultaneous with the reimbursements, Petitioners' exclusive contracts to bottle and sell Coca-Cola in their

respective territories were surrendered and replaced by others reflecting the elimination of Crosswell and its override on syrup. The January 8, 1964 contracts did not otherwise alter Petitioners' rights to bottle and sell Coca-Cola (Par. (14) of the Stipulation of Facts, Appendix, *infra*, at p. 22).

In their 1964 income tax returns, Petitioners claimed deductions for their payments reimbursing Company. The Commissioner of Internal Revenue disallowed the deductions. Petitioners paid the resulting deficiencies and, in due time, commenced actions for recovery in the District Court, invoking that Court's jurisdiction under Title 28 United States Code, Sec. 1346(a)(1). The District Court upheld the action of the Commissioner, denying any deduction for Petitioners' payments. Petitioners appealed to the Fourth Circuit Court of Appeals, invoking that Court's jurisdiction under Title 28 United States Code, Sec. 1291. That Court affirmed the decision of the District Court.

REASONS FOR GRANTING THE WRIT

In affirming the District Court's decision, the Fourth Circuit Court of Appeals decided an important question of Federal law which has not been, but which should be, settled by this Court. For this reason the Court should grant the writ.

The decisions below have prescribed a rule that an expenditure constitutes a capital expenditure where it obtains for the taxpayer a business advantage extending beyond the taxable year. Both the District and the Fourth Circuit Court cited as authority for this its decision *U. S. v. Akin*, 248 F2d 742 (10 Cir. 1957) and *Richmond Television Corp. v. U. S.*, 345 F2d 901 (4 Cir. 1964). Neither of those cases, however, raised the question; therefore, the language in the decisions cited as authority for the rule at best is *obiter dictum*.

It is important that this Court settle the question raised in these cases. Disallowance of deductions claimed for expenditures on the basis that the advantages or benefits secured extend beyond the taxable year will create chaos and confusion, because many such deductions historically have been allowed. Great numbers of taxpayers have claimed, and

Respondent has allowed, deductions for many expenditures which secured business advantages or benefits extending beyond the taxable year of the expenditures. For example, deductions have been claimed and allowed for the following types of expenditures:

(1) Expenditures regularly made in connection with the training of insurance agents by corporations carrying on life insurance businesses, which agents serve the corporations over more than one year, hopefully for their entire working careers.

(2) Expenditures regularly made by automobile dealers to train mechanics who serve the dealers over more than one year.

(3) Expenditures made by manufacturers to consulting engineers for having reviewed plants and procedures and instituted changes resulting in benefits continuing for an indefinite period of time.

(4) Expenditures made by manufacturers to secure the rights to televise the World Series baseball games with resulting benefits continuing for several years.

(5) Expenditures made by manufacturers in certain taxable years for advertisements in national magazines resulting in benefits extending beyond such taxable years.

(6) Expenditures by motion picture producers to make "stars" of actors and actresses with resulting benefits extending over many years.

(7) Expenditures by corporations to send prospective top-management employees to advanced business administration schools for extensive training and exposure to others similarly situated, with resulting benefits extending over many years.

Application of the restriction in the decisions below will result in disallowance of deductions claimed for the expenditures mentioned, and many others of similar import.

The decisions below interpret the Internal Revenue Code to deny deduction for an expenditure where the advantage or benefit secured by the expenditure runs beyond the taxable year of the expenditure. There is no such restriction provided for in the Internal Revenue Code. We respectfully submit that an earlier decision of the Fourth Circuit Court of Appeals itself

correctly applies and interprets the applicable law and demonstrates allowance of deductions for expenditures despite the fact that advantages and benefits secured extend beyond the taxable year. See *Marsh Fork Coal Co. v. Lucas*, 42 F2d 83 (4 Cir. 1930).

The taxpayer in *Marsh Fork Coal*, made expenditures for electric locomotives, mine cars and steel rails. The normal life of all the equipment exceeded one year, that of the locomotives being estimated from 8 to 10 years, and that of the cars at about 5 years. The taxpayer contended that purchase of the equipment did not add anything to the value of the mining property, that its purchase was made necessary by the removal of coal, and that its installation was incidental to the conduct of its business. While there seems to have been no doubt about the advantages and benefits of the purchase extending beyond the taxable year, the Fourth Circuit nevertheless approved the deduction of the expenditures as an ordinary and necessary business expense. See also *New Pittsburg Coal Company v. United States of America*, 200 F2d 146 (6 Cir. 1952).

Also, other Courts of Appeal have allowed deductions for expenditures even though the advantages or benefits secured quite obviously extended beyond the taxable year of the expenditures. *E. H. Sheldon & Co. v. Commissioner*, 214 F2d 654 (6 Cir. 1954); *Cravens v. Commissioner*, 272 F2d 895 (10 Cir. 1959).

The question of deductibility of the cost of printing and distributing catalogs was involved in *E. H. Sheldon & Co., supra.* Sheldon designed, manufactured, sold, and installed laboratory equipment. In preparing and distributing catalogs, it incurred costs and claimed deductions therefor in its income tax returns. The Commissioner denied the deductions and contended that the expenditures were recoverable only through amortization over the estimated useful life of five years. Sustaining the Commissioner as to the capital nature of the expenditures, the Tax Court (19 T.C. 481) rejected Sheldon's contentions that the cost of printing and distributing the catalogs was an advertising expense, or substantially the equivalent of an advertising expense. Reversing the Tax Court and allowing the deduction, the Sixth Circuit said:

> The effect of advertising, by its nature, is usually not limited to the year in which it is done, but has a useful life somewhat indefinite in the future. *The fact that an expenditure produces something that has a useful life extending beyond the taxable year is clearly not the controlling test.* • • • It has been held a number of times that advertising expenses, even though incurred heavily in a certain year with resulting benefits over future years, is nevertheless a deductible expense for the year in which expended. (Emphasis added and citations omitted.)

It was *after* the Fourth Circuit handed down its decision in the cases at bar that the Commissioner announced his disapproval of the Sixth Circuit's decision. Rev. Rul. 68-360, 1968-28 IRB 14 (July 8, 1968).

In the *Cravens* case, *supra*, the decision dealt with the question of deductibility of expenditures for feed for cattle. The Tenth Circuit Court of Appeals ruled in favor of deduction saying:

> The fact that the expenditures covered feed for more than a twelve-month period does not convert • • • [the payment] into a capital expenditure • • •.

In a case involving a newspaper publisher, the Commissioner denied deductions on the ground that the expenditures were made to increase circulation. The Eighth Circuit, however, held the expenditures to be ordinary and necessary expenses in the nature of upkeep and maintenance of the circulation structure. *Perkins Brothers Company v. Commissioner*, 78 F2d 35 (8 Cir. 1935).

Quite obviously the advantages and benefits of the expenditures in the foregoing cases extended beyond the taxable year of the payments, yet the Courts of Appeal allowed deductions for the expenditures. Also, the Commissioner has allowed deductions for advertising expenditures since 1921 despite the fact that the advantages or benefits of the advertising may extend beyond the taxable year. O.D. 1039, 5 CB 130.

It is particularly important that the decision of the Fourth Circuit in the instant cases be reviewed in view of the decision in *Pressed Steel Car Company, Inc. v. Commissioner*, 20 T.C.

198 (1953), acq. 1956-2 CB 8. The officers of Pressed Steel signed an agreement in 1940 with another corporation requiring Pressed Steel to pay the other corporation $750 for each armored tank sold by Pressed Steel. Previously Pressed Steel had not manufactured armored tanks but thereafter it did and sold them. Pressed Steel tried to repudiate the acts of its officers and cancel the said agreement. Ultimately it paid $375,000 for the stock of the other corporation in order to liquidate it and be rid of the burdensome contract. Pressed Steel deducted the payment; the Commissioner of Internal Revenue denied the deduction. Reversing the Commissioner, the Tax Court (20 T.C. 198, 200), said:

> The evidence clearly shows that the only purpose of the petitioner in paying the $375,000 and acquiring the stock was to settle all claims against it under the agreement of July 23, 1940, and it had no intention of buying or holding that stock as an investment. The payment must be considered in accordance with the purpose for which the petitioner paid it in determining the tax consequences to the petitioner. Cf. *Kimbell Diamond Milling Co.*, 14 T. C. 74, affd. 187 F. 2d 718, certiorari denied 342 U.S. 827; cf. *Western Wine & Liquor Co.*, 18 T. C. 1090; *Charles A. Clark*, 19 T. C. 48; *Hogg v. Allen*, 105 F. Supp. 12. That purpose was to be relieved of a burdensome contract although the transaction took the form of a stock purchase. The amount is deductible as an ordinary and necessary expense of doing business or as a business loss. *Helvering v. Community Bond & Mortgage Corporation*, 74 F. 2d 727; *Camloc Fastener Co.*, 10 T. C. 1024; *Olympia Harbor Lumber Co.*, 30 B. T. A. 114, affd. 79 F. 2d 394.

Even in his belated announcement with respect to the Sixth Circuit's decision in the *Sheldon* case, the Commissioner gave no indication of withdrawing his 1956 acquiescence in the *Pressed Steel* decision.

The principle of the *Pressed Steel* decision has been applied by other courts. In *Stuart Co. v. Commissioner*, 195 F2d 176 (9 Cir. 1952), aff'g 9 TCM 585, a case quite analogous to the ones before the Court, deduction was allowed for expenditures made to secure relief from an onerous contract. In

its decision in that case, the Tax Court (9 TCM 585, 590) said:

> It is well settled that payments made to secure relief from an onerous contract are deductible as ordinary and necessary business expenses under Section 23 (a) of the Internal Revenue Code [Now Sec. 162 (a)], *Helvering v. Community Bond & Mortgage Co.*, 74 Fed. (2d) 727; affirming 27 B.T.A. 480; *Alexander J. Cassatt*, 47 B.T.A. 400; aff'd., 137 Fed. (2d) 745; *Cleveland Allerton Hotel, Inc. v. Commissioner*, 166 Fed. (2d) 805. • • •

Other courts also have applied the principle. *Metropolitan Co. v. U.S.*, 176 F. Supp. 195 (D.C. S.D. O. 1959); *The Montana Power Company v. U.S.*, 145 Ct. Cls. 611, 171 F. Supp. 943 (Ct. Cls. 1959); *Appeal of Denholm & McKay Co.*, 2 B.T.A. 444 (1925), acq. IV-2 CB 2.

In its opinion denying rehearing (Appendix, *infra*, p. 19), the Fourth Circuit viewed the examples cited by Petitioners to show deductions for expenditures even though the advantages extended beyond the taxable year as ones where "the advantage acquired bore a close analogy to a 'wasting' asset." Quite to the contrary, however, the examples cited and relied upon by Petitioners to reflect such deductions did not involve advantages having definite measurable lives. In reference to the cases at bar, the Fourth Circuit said "it is reasonable to view the advantages acquired as having an unlimited life, and petitioner has made no showing to the contrary. Where the benefit derived from an expenditure cannot be expected to cease, it would seem inappropriate to grant a deduction either currently or amortized over a period of years." The Court apparently was unconcerned about the inappropriateness of denying deductions for expenditures made to reduce costs and thereby indefinitelyincrease taxable income. Furthermore, the Court did not recognize the rule that the life of the advantage or benefit secured by an expenditure is not the controlling test in determining whether a deduction is allowable for an ordinary and necessary business expenditure. *E. H. Sheldon & Co. v. Commissioner, supra,* quotation *supra* at p. 7.

The effect of the decisions below is to include within the

definition of a capital asset every business advantage or benefit which runs beyond the taxable year. Such an extension of the definition is clearly erroneous and contrary to the rule of this Court providing that the definition of a capital asset must be narrowly applied and the exclusions therefrom broadly interpreted. *Corn Products Refining Company v. Commissioner*, 350 U. S. 46 (1955). Such a change in a basic rule of taxation without the change evolving through the regular legislative processes and procedures will invite extensive litigation on a continuing basis. If such a change is to be made without enactment by Congress, then it should be done only after due consideration by this Court in order to assure clarity and uniformity throughout the United States.

As this Court long ago observed, taxation is a practical matter, and the laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. *Farmer's Loan & Trust Co. v. State of Minnesota*, 280 U.S. 204, 212 (1930). Here Petitioners made their 1964 payments solely to eliminate Crosswell and thereby be rid of Crosswell's burdensome and onerous contracts. That is all the payments secured. Petitioners after their payments had the same rights to bottle and sell Coca-Cola in the same territories as they had before. As a direct result of Petitioners' payments, Crosswell and its contracts were eliminated, and this reduced the cost of Coca-Cola syrup. The payments did not secure for Petitioners any new source of supply or any greater interest in or right to their existing source of supply. To deny Petitioners deductions for their payments made to be rid of burdensome and onerous contracts and thereby to increase their profits (and, incidentally, their income taxes) indeed would be oppressive.

CONCLUSION

For the reasons set forth above, Petitioners respectfully pray that a writ of certiorari issue to the Court of Appeals for the Fourth Circuit.

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APPENDIX FOR PETITIONERS

Supreme Court of The United States

No.

DARLINGTON-HARTSVILLE COCA-COLA BOTTLING COMPANY, INC., *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

No.

SPARTANBURG COCA-COLA BOTTLING CO., *Petitioner*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Civil Action No. 66-320

Darlington-Hartsville Coca-Cola Bottling Company, Inc., Plaintiff

v.

United States of America, Defendant

Civil Action No. 66-330

Spartanburg Coca-Cola Bottling Co., Plaintiff

v.

United States of America, Defendant

ORDER

This matter has been submitted to the Court for a determination upon the basis of written briefs presented on behalf of the parties to these actions. The facts of the case have been stipulated and the stipulation is hereby incorporated and made a part of this Order by reference as being an accurate statement of the factual situation surrounding this case.

The sole issue is whether the payments made by the plaintiff bottling companies on January 8, 1964, to The Coca-Cola Company are deductible by the plaintiffs as ordinary and necessary business expenses under Sec. 162 (a) of the Internal Revenue Code of 1954.

The plaintiffs argue that these payments were made solely to eliminate burdensome and onerous contracts and are, therefore, deductible as ordinary and necessary business expenses. In support of this contention, the plaintiffs cite the following authorities: *Stuart Co. v Commissioner,* 9 TCM 585 (1950), aff'd 195 F.2d 176 (9th Cir. 1952); *Pressed Steel Car Co. v Commissioner,* 20 TC 198 (1953), acq. 1956-2 CB 8; *Bressner Radio, Inc. v Commissioner,* 28 TC 378 (1957), acq. 1958-1 CB 4, rev'd and rem'd on other grounds 267 F. 2d 520 (2d

Cir. 1959); Appeal of Denholm & McKay Co., 2 BTA 44 (1925), acq. IV-2 CB 2; *Helvering v Community Bond & Mfg. Co.*, 74 F. 2d 727 (2d Cir. 1935), aff'g 27 BTA 480; *Montana Power Co. v United States*, 171 F. Supp. 943 (Ct. Cls. 1959); and *Metropolitan Co. v United States*, 176 F. Supp. 195 (S.D. Ohio 1959).

On the other hand, the Government takes the position that these payments were for the purpose of acquiring new and more favorable franchise bottling contracts and, therefore, constitute capital expenditures which are not deductible as ordinary and necessary business expenses. *Welch v Helvering*, 290 U.S. 111 (1933); Sec. 263 of the Internal Revenue Code of 1954.

Regardless of whether these payments were for new and more favorable contracts as the Government contends or for the elimination of burdensome and onerous contracts as the plaintiffs contend, the ultimate purpose and effect of these payments is clear. They were part of a well thought out three part plan to improve the profits of the bottling company plaintiffs by eliminating a non-productive middle man's contract, thereby reducing the base prices for syrup paid by the plaintiffs by making possible direct and more favorable contracts with the Coca-Cola Company which were subsequently negotiated.

The general rule is that an expenditure is a capital outlay, as opposed to an ordinary and necessary business expense, if it brings about the acquisition of a business advantage extending into the indefinite future. *United States v Akin*, 248 F. 2d 742 (10th Cir. 1957). This principle has been applied in this Circuit. "A taxpayer may, therefore, not deduct as a current business expense the full cost of acquiring an asset, tangible or intangible, which benefits the taxpayer for more than one year." *Richmond Television Corp. v United States*, 345 F. 2d 901, 907 (4th Cir. 1964).

The purpose of this rule is clear. Our income taxation is a plan to match the income and expenses of a given taxable year so as to tax only that which is net income. An expense which results in the acquisition of even an intangible business

advantage which benefits the taxpayer for more than one year, therefore, may not be deducted as a current business expense.

These January 8, 1964, payments by the plaintiffs secured for them a business advantage which extends into the indefinite future. Even though the payments were made only once and were nonrecurring. The benefits gained by virtue of these payments could reasonably be expected to continue for an indefinite time. Indeed, they have already survived the accounting period for which the business deduction is claimed.

The Court realizes that the expenditure does not have to be recurrent, does not have to be an absolute necessity, and does not have to be involuntarily made in order to qualify for a business deduction. The Court further understands that each case must be considered under its own peculiar facts and that in this case no actual physical assets were obtained. Nevertheless, the Court concludes that these payments constitute capital expenditures not deductible as ordinary and necessary business expenses since they obtained for the plaintiffs an intangible business advantage of an indefinite duration which extends beyond the accounting period for which the deduction is claimed, and into the indefinite future. It must be concluded that the plaintiffs are not entitled to refunds. Accordingly,

IT IS ORDERED that judgment be entered in favor of the defendant, the United States of America.

Columbia, S.C.
May 1967

s/J. Robert Martin, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,664

Darlington-Hartsville Coca-Cola Bottling Company, Inc.,
Appellant,

Versus

United States of America,
Appellee.

No. 11,665

Spartanburg Coca-Cola Bottling Co.,
Appellant,

versus

United States of America,
Appellee.

Before Haynsworth, Chief Judge, and Bryan and Butzner, Circuit Judges.

Albert V. Bryan, Circuit Judge:

Taxpayers, Darlington-Hartsville Coca-Cola Bottling Company, Inc. (Darlington) and Spartanburg Coca-Cola Bottling Company (Spartanburg), appeal the District Court's decision that certain payments made by them to the Coca-Cola Company (Coca-Cola) in 1964 were correctly characterized by the Commissioner of Internal Revenue as capital expenditures. We affirm.

In outline the facts are these. The payments were made as part of a plan to eliminate an unwanted middleman in the distribution of Coca-Cola syrup. For many years the middleman, H.D. and J. K. Crosswell, Inc. (Crosswell) had exclusive rights to bottle the syrup as the Coca-Cola beverage in specified areas of South Carolina. Under this agreement, Crosswell bought syrup at a set price per gallon, and was empowered

with the approval of Coca-Cola to grant bottling privileges to other (second-line) companies. As Crosswell second-liners, taxpayers were entitled to put up the beverage with syrup from Crosswell. Spartanburg and Darlington gave Crosswell more for this syrup than it had paid Coca-Cola, but Crosswell did almost nothing in dispensing the commodity.

Feeling the pinch of competition, the Coca-Cola Company and taxpayers decided to be rid of Crosswell so they could buy syrup at a lower figure. Under a negotiated plan, Coca-Cola purchased Crosswell's capital stock and liquidated the corporation. Taxpayers then reimbursed Coca-Cola for the stock acquisition, and in exchange were awarded contracts to obtain syrup at a price not dearer than was charged Crosswell.

Taxpayers deducted the amount of reimbursements as ordinary and necessary business expense. Int. Rev. Code of 1954, §162. With the deduction disallowed, the deficiency assessed and paid, this suit for refund followed.

The District Judge was of the same mind as the Commissioner upon the capital nature of the reimbursement. We concur, and adopt the judge's opinion save in its possible implication that a payment merely to be rid of "burdensome and onerous contracts" is per se a capital layout. Presumably, every such payment would bring a correlative advantage — relief from the burden — but this alone would not turn the money into capital. See Pressed Steel Car Co., 20 T.C. 198 (1953), *acq.* 1956-2 Cum. Bull. 1; Cleveland Allerton Hotel v. Commissioner, 166 F2d 805 (6 Cir. 1948).

What does distinguish a capital expenditure, in this respect, is its intendment to produce a positive business benefit whose effects will be reaped in seasons beyond a single year. Richmond Television Corp. v. United States, 345 F2d 901 (4 Cir. 1965); United States v. Akin, 248 F2d 742, 744 (10 Cir. 1957); see 4 A. Mertens, Federal Income Taxation §25.20 (1966). Taxpayers' outlays were designed to procure a less costly Coca-Cola syrup. The contracts thus obtained were of indefinite duration, and were contrived to better the profits over the years to come. For this reason, in addition to the

others arrayed by the District Court, each taxpayer's undertaking became a capital investment.

Affirmed.

OPINION ON PETITION FOR REHEARING

Albert V. Bryan, Circuit Judge:

In a petition for rehearing petitioners cited instances where deductions have been allowed even though the taxpayer acquired through the expenditure in question an advantage the useful life of which extended into the indefinite future. It should be noted, however, that in the examples cited, the advantage acquired bore a close analogy to a "wasting" asset. Though its useful life extended into the indefinite future, it was reasonable to assume that at some point its life would come to an end. See *Amortization of Intangibles: An Examination of the Tax Treatment of Purchased Goodwill,* 81 Harv. L. Rev. 859 (1968). This "wasting" characteristic distinguishes the examples cited from the advantage acquired in the instant ease. Here, it is reasonable to view the advantage acquired as having an unlimited useful life, and petitioner has made no showing to the contrary. Where the benefit derived from an expenditure cannot be expected to cease, it would seem inappropriate to grant a deduction either currently or amortized over a period of years.

For these reasons the petition for rehearing will be denied.

STIPULATION OF FACTS

(Full Stipulation set out in Appendix to Respondent's Brief to Court of Appeals at pps. 24-34)

(10) During 1963, most of the bottling companies having contracts with Crosswell, Inc. and Estate entered into negotiations among themselves and with The Coca-Cola Company to develop some plan whereby such bottling companies could purchase Coca-Cola syrup at more favorable prices. Other carbonated soft drinks by that time were competing strenuously with Coca-Cola and had reduced Coca-Cola's share of the carbonated soft drink market. Because of competition from

other soft drinks, The Coca-Cola Company during the period following World War II commenced marketing Coca-Cola in several different packages which increased Plaintiffs' expense of doing business. Therefore, The Coca-Cola Company was interested in consolidating and upgrading its bottling companies in order to improve their profits and thereby promote its own interests.

The bottling companies and The Coca-Cola Company decided that elimination of Crosswell, Inc. and its contracts would be one way to make it possible for the bottling companies to buy Coca-Cola syrup at more favorable prices. The stockholders of Crosswell, Inc. refused to consider a sale of their Crosswell, Inc. stock to the separate bottling companies but agreed to sell their stock to The Coca-Cola Company. Therefore, the bottling companies and The Coca-Cola Company agreed upon the following plan:

> (a) The Coca-Cola Company would purchase the stock and liquidate Crosswell, Inc.
>
> (b) The bottling companies would then reimburse The Coca-Cola Company for the purchase price of the Crosswell, Inc. stock.
>
> (c) Simultaneous with the reimbursement, the Crosswell, Inc. contracts would be surrendered and The Coca-Cola Company would replace them with contracts setting the base price of syrup at $1.30 per gallon.

• • •

(14) The contracts dated January 8, 1964, did not alter in any degree the geographic areas specified in the earlier contracts or the provisions governing the bottling and sale of Coca-Cola in the respective geographic areas. They, however, did reduce the base price of Coca-Cola syrup to Spartanburg from $1.40 to $1.30 per gallon, and to Darlington from $1.50 to $1.35 per gallon.

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No. 532

In the Supreme Court of the United States

OCTOBER TERM, 1968

DARLINGTON-HARTSVILLE COCA-COLA BOTTLING COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners are bottlers of Coca-Cola. Prior to January 8, 1964, they obtained Coca-Cola syrup through Crosswell under contracts fixing the price to them at specified amounts per gallon above the Coca-Cola Company's price to Crosswell. On January 8, 1964, they made certain payments required to eliminate Crosswell and to achieve the right, in perpetuity, to purchase the syrup directly from the Coca-Cola Company at the lesser price paid by Crosswell. (Pet. App. 21–22). The sole question in these cases is whether those payments are expenditures that must be capitalized, as the courts below found, or are currently de-

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ductible ordinary and necessary business expenses, as petitioners contend.

The decision below is correct. There is no conflict of decisions or any other reason for further review.

1. It is elementary that an expenditure for which the taxpayer obtains an asset that will never be consumed in the business, or will be consumed only gradually over a period of years, may not be the subject of a current deduction. See, *e.g.*, *Commissioner* v. *Boston Elevated Ry. Co.*, 196 F. 2d 923 (C.A. 1); *Cotlow* v. *Commissioner*, 228 F. 2d 186 (C.A. 2); *Commissioner* v. *Indiana Broadcasting Corp.*, 350 F. 2d 580 (C.A. 7), certiorari denied, 382 U.S. 1027; see, generally, 4A Mertens, Law of Federal Income Taxation (1966 Rev.), Section 25.20. The sole purpose of the outlay at issue here was to acquire the contractual right formerly held by Crosswell to buy Coca-Cola syrup for the low price available only to the primary franchise holder. Petitioners do not challenge the ruling that the right was (Pet. 20) of "indefinite duration." Consequently the deduction was properly denied.

2. The cases petitioner asserts (Pet. 6–9) to be in conflict with the decision here represent several lines of authority, each, on its facts, resolving in favor of a taxpayer a close question of deductibility, and none involving facts or analysis that might offer a fair precedent for resolving the present case.[1] Thus, *E. H. Sheldon & Co.* v. *Commissioner*, 214 F. 2d 655 (C.A. 6), dealing with the cost of printing a sales catalog that would be used for more than one year, and

[1] This is true also of the seven examples cited on p. 5 of the petition.

Perkins Bros. v. *Commissioner,* 78 F. 2d 152 (C.A. 8), where the issue was the tax treatment of such costs as those of a contest, incurred to build up a newspaper's circulation, have to do with the problem of advertising expenses and accord in their result with other like cases. See the authorities cited in *Sheldon,* 214 F. 2d at 659; compare Rev. Rul. 68–561, 1968–43 I.R.B. 10.

Cravens v. *Commissioner,* 272 F. 2d 895 (C.A. 10), is somewhat closer to the present case, in that the issue concerned an expense incurred in one year to assure the delivery of cattle feed during the following two taxable years. But the decision allowing a current deduction rests on an unusual set of facts: because a severe drought had forced the taxpayers to choose between (272 F. 2d at 899) "disposing of at least part of his herd or arranging for feed," the case was thought to present the type of extraordinary expenditure designed to preserve "the safety of a business", *Welch* v. *Helvering,* 290 U.S. 111, 114, which has been treated as a current item. See, also, *Kornhauser* v. *United States,* 276 U.S. 145.

Stuart Co. v. *Commissioner,* decided June 30, 1950 (9 T.C.M. 585 (C.C.H.), affirmed, 195 F. 2d 176 (C.A. 9); *Pressed Steel Car Co.* v. *Commissioner,* 20 T.C. 198; *Metropolitan Co.* v. *United States,* 176 F. Supp. 195 (S.D. Ohio); and *Montana Power Co.* v. *United States,* 145 Ct. Cl. 611, 171 F. Supp. 943, deal with the so-called "onerous contract" and hold that payments made to secure relief from contractual obligations are currently deductible. Those cases, however, did not purport to allow a current deduction to any

taxpayer in the face of the established fact as here that it had acquired, in exchange for the payment, a new and valuable asset which would serve its income producing interests in future years. Indeed, in those cases, the Government never asserted the theory that a release from a contract constituted asset of continuing value.

Millinery Corp. v. *Commissioner,* 350 U.S. 456, illustrates the distinction, and controls this case. There a lessee purchased the fee, thus obtaining use of the property free of the prior lease obligations. The lessee then claimed an immediate deduction of the amount by which the purchase price exceeded the value of the land without the improvements on the theory (*id.* at 459) that the amount was allocable to the elimination of the alleged "onerous lease." This Court, however, required the taxpayer to capitalize the entire expenditure because (*id.* at 461) it "acquired two assets—land and a building—whose use it will have for the remainder of their useful lives * * *."[2] The same is true of the rights petitioners acquired to purchase Coca-Cola syrup, and a decision could not be rendered in their favor so long as *Millinery* stands.[3]

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[2] *Denholm & McCay Co.*, 2 B.T.A. 444, Acq. IV-2 Cum. Bul. 2 (1925), and *Cleveland-Allerton Hotel* v. *Commissioner*, 166 F. 2d 805 (C.A. 6) (see Pet. 9), have been overruled by *Millinery*. See 350 U.S. at 458–459.

[3] *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, does not (see Pet. 10) bear on this case. The issue there was whether the gains realized on the sale of futures contracts were capital or ordinary, where the contracts had been acquired to insure a source of raw materials. There was no claim that the cost of acquiring the futures was deductible when incurred. Even if petitioner's contractual right to purchase Coca-Cola syrup was

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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not a capital item, it would not follow that the cost at issue here could be deducted, for, whatever the nature of the item, a current deduction is unavailable if the property remains useful over a number of years. Compare, *e.g.*, the treatment of depreciable assets (Section 1221(2) of the 1954 Code) used in the trade or business, which are not capital, but must be depreciated. Cf. *Tulane Hardwood Lumber Co.* v. *Commissioner*, 24 T.C. 1146; *Journal Co.* v. *United States*, 195 F. Supp. 434 (E.D. Wis.).

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